IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-881

FRANK F. FASI, Mayor, City and County of Honolulu, FRANCIS A. KEALA, Chief of Police, Honolulu Police Department, City and County of Honolulu, and FRANCIS K. MATSUMOTO, Major, Honolulu Police Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAUKOA POKINI, aka James Akina, aka Poki,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Attorney for Respondent

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petitioners,

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JAMES KAALAUKOA POKINI, aka James Akina, aka Poki,

Respondent.

QUESTIONS PRESENTED

1. Is the Civil Rights Attorney's Fees Awards Act of 1976 applicable to cases which are pending as of the date of its enactment?

STATEMENT OF THE CASE

This action was initiated by Respondent pursuant to 42 USC § 1983 by virtue of his segregated confinement at Halawa Jail, but essentially to challenge the complete and total absence of any written rules, regulations or guidelines setting out the specific procedures to be followed whenever the jail administration sought to bring about a change in the custodial status of an inmate. As a result of this action and the negotiations between agents for the Petitioners and the Respondent's attorneys, written rules and regulations

governing such changes in custodial status and, in effect, protecting and enhancing the due process rights of all inmates at Halawa Jail were incorporated into the jail's administrative procedure.

Subsequently, Respondent moved for attorneys' fees pursuant to the then-viable "private attorney genera;" doctrine. In the wake of the decision in Alyeska Pipeline Service Co., v. Wilderness Society, 421 US 240 (1975) Respondent's motion was denied and he appealed to the United States Court of Appeals for the Ninth Circuit. Following the submission of briefs to the Court of Appeals the Civil Rights Attorney's Fees Awards Act of 1976, PL 94-559, 90 Stat 2641 (hereinafter referred to as "Act") was passed. When the Court of Appeals indicated its intention to reverse the district court's denial of attorneys' fees on the basis of the Act during oral argument held in Honolulu on June 6, 1977, it requested both sides to submit written statements relating to the amount of attorneys' fees which should be awarded to Respondent in the event of such a reversal. In response to this request Petitioners' attorney submitted a letter to the Court of Appeals dated June 27, 1977 (a copy of which is appended hereto) during the course of which the specific request of the Court of Appeals was brushed aside and several new issues were injected into this case. These new issues were discussed on pages 2-5 of said letter and, as the record of this case will show, had never been raised or even discussed prior thereto. Thus, the first three reasons set out in support of the Petition for Certiorari were first raised in the course of this letter. As such, they have no place in the aforesaid petition.

REASONS FOR DENYING THE WRIT

1. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT IS APPLICABLE TO PENDING CASES.

The Act provides in pertinent part:

> "In any action or proceeding to enforce a provision of Section . . . 1979 (42 USC § 1983) . . . of the revised statutes . . . the court in its discretion may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs."

In the instant case the Act served as both a specific legislative response to Alyeska Pipeline Service Co. v. Wilderness Society, supra, and the basis for thb reversal of the district court's denial of Respondent's motion for attorneys' fees by the Ninth Circuit Court of Appeals. As the Act was passed while Respondent's appeal to the Ninth Circuit was pending, the Court of Appeals was faced with the question of whether the Act should apply to pending litigation. As in Stanford Daily v. Zurcher, 550 F2d 464 (CA9, 1977), the Court of Appeals decided that the Act should apply. In doing so it made a decision which finds overwhelming support in both the legislative history of the Act and the available case law.

The general rule of thumb, followed in Bradley v. Richmond School Board, 416 US 696 (1973) and Thorpe v. Housing Authority of the City of Durham, 393 US 268 (1969) is that retroactive application should be made except where "manifest injustice" would result or the legislative intend behind the new law is ambiguous. The claim of "manifest injustice" was raised in Bradley and this court nevertheless held that legislation authorizing attorney's fees in Title VI cases was retroactive and obviously found no manifest injustice in doing so. Similarly, in the instant case any claim of "manifest

injustice" is equally lacking in merit. Reasonable attorneys' fees were requested in the original complaint filed herein and, indeed, would have been granted by the district court under the "private attorney general" doctrine if the Alyeska Pipeline Service Co. v. Wilderness Society decision had not been rendered. As the award of attorneys' fees is now based upon a specific legislative response to Alyeska, it is clear that the present status of this matter is simply consistent with the state of the law at the time this action was initiated and litigated.

The legislative history of the Act makes it abundantly clear that it was always to apply to pending cases. The report of the House Judiciary Committee states:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. (citations ommitted)." (H.R.Rep. No. 94-1558, 94th Cong. Second Sess. 1976)

Furthermore, a review of the congressional record reveals that all U.S. House and Senate debates on this issue were in total agreement with this position. Specifically, see 122 Cngl. Rec. H.12166 (October 1, 1976) which reveals that a motion in opposition to this position was soundly defeated. In addition, a large body of case law supporting this position has arisen in recent years. See Rosado v. Santiago, 562F2d 114 (CA1, 1977); Seals v. Quarterly County Court, 562 F2d 390 (CA6, 1977); Wharton v. Knefel, 562 F2d 550 (CA8, 1977); Gates v. Collier, 559 F2d 241 (CA5, 1977); Gay Lib v. University of Missouri, 558 F2d 848(CA8, 1977); Hodge v. Seiler, 558 F2d 284 (CA5, 1977).

2. NO SHOWING OF INDIVIDUAL FAULT OR BAD FAITH IS REQUIRED.

The fact that the district court did not find individual fault or bad faith on the part of the Petitioners during litigation is irrelevant. Alyeska was clearly inapplicable to situations involving bad faith (see Alyeska supra, at pages 258-259) and, in fact, Senator Abourezk stated that one of the functions of the Act was to eliminate the necessity, created by Alyeska, of adjudicating the good faith of the defendants. See 122 Cong. Rec. S. 17052 (1976). The holding in Johnson v. Georgia Highway Express, 488 F2d 714 (CA5, 1974) provides further support for this position in stating that not only violations of the constitution, but also effectuation of policies intertwined therewith merit awards of attorney's fees.

3. THE ACT MAY BE APPLIED TO LOCAL MUNICIPALITIES.

Further reference to the legislative history of the Act reveals that state and municipal governments and their agents are intended to come within its purview:

> "Defendants in these cases are often state or local bodies or state or local officials. In such cases, it is intended that the attorney's fees, like other items of cost, will be collected either from the official in his official capacity or from funds of his agency or under his control, or from state or local government whether or not the agency or government is a named party." S.Rep. No. 94-1011, supra, at 5.

4. THE GRANTING OF CERTIORARI IN STANFORD DAILY V. ZURCHER IS NOT SIGNIFICANT.

The Ninth Circuit's decision in Stanford Daily v. Zurcher, supra, like the instant case, applied the Act to a case which was pending at the time of its enactment. There the similarity ends. In Stanford Daily the retroactivity issue was clearly overshadowed by other issues involving the application of the Fourth Amendment to police searches of parties who are not suspected of criminal activity. The Fourth Amendment issues involved in Stanford Daily are understandably of grave importance and appeared to be the basis for the granting of certiorari in that case. It is noteworthy, however, that the United States filed an amicus brief in Stanford Daily stating that if the decision of the lower court on the Fourth Amendment issues is upheld, the award of attorney's fees should likewise be upheld. In any event, the issue herein is exclusively concerned with the award of attorneys' fees and cannot, under any stretch of the imagination, be equated with the very significant Fourth Amendment issues involved in Stanford Daily.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, March 6 1978

Respectfully submitted,

Dennis W. Potts

DENNIS W. POTTS *
Attorney for Respondent

* Respondent's attorney wishes to acknowledge the invaluable time and assistance donated by John F. Schweigert, Esq. of Honolulu, Hawaii in the preparation of this response.

APPENDIX

Mr. Potts

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR

BARRY CHUNG
CORPORATION COUNSEL

June 27, 1977

The Honorable Justices of the
United States Court of Appeals
for the Ninth Circuit
U.S. Court of Appeals and Post
Office Bldg.
7th & Mission Streets
P. O. Box 547
San Francisco, California 94101

Honorable Justices:

Re: NO. 75-3039, JAMES K. POKINI v.
FRANK F. FASI et al.

During oral argument of the above-referenced case, on June 6, 1977, in the Federal Courthouse in Honolulu, the Court instructed the attorney for the Appellant to submit a letter addressing the propriety and amount of attorney's fees that could be awarded for his appellate services in the case. The Appellees were given an additional period of time in which they could address the same matters. This letter accordingly is in response to the Court's directive.

Attorney for Appellant has submitted an affidavit with his letter of June 14, 1977 setting forth his estimate of the time spent in preparing the appeal in this case and indicating his customary hourly fee. Appellees have no means of confirming or contesting the assertions contained in the affidavit, and accordingly are unable to comment meaningfully upon the matter. We therefore must rely upon the representations of Appellant's attorney as a brother lawyer and officer of the Court.

Before the Court by fiat excises perhaps $8,500 from the pockets of the Appellees, we would take this opportunity to present the matters herein for the Court's further deliberation and consideration.

This case began as an action by Appellant, as a prisoner detained in the City and County jail, against the Mayor of the City and County of Honolulu, its Chief of Police, and the jail custodian; Appellant, James Pokini, was residing in the County jail after having been sentenced to the State Prison by a State Circuit Court Judge. Because of fears for his safety in the State Prison, he was being detained in the County jail. The litigation commenced as an effort by Appellant to contest his being segregated from the general jail population because of threats against him received after he was placed in the County jail. He was not placed in solitary confinement, but placed in an area of the jail which afforded him greater security and closer observation by jail custodial personnel. The reason for the segregation was explained to him and he acknowledged that he also was aware of threats made to his family. Visitation privileges for Appellant were ordered for the weekend of March 2, 1974, the only weekend he was segregated, and he was reassigned to a cell to share with another inmate on March 5, 1974. Because of his threats to kill the other inmate, he was assigned to a cell by himself, but with full privileges.

Notwithstanding the foregoing, the commencement of this litigation on February 28, 1974, did focus attention on the lack of written criteria by which prisoners were segregated from the general jail population. Such rules and regulations were drafted and promulgated as a result of the litigation. A stipulated judgment subsequently was entered into, at which time Appellees considered the litigation terminated, no consideration being given at the time to the matter of attorney's fees. After the entry of judgment, Appellant later moved for attorney's fees; the motion was denied by the trial court judge. This appeal followed.

At the hearing of the appeal on June 6, 1977, the comments received from the bench indicated an inclination on the part of the Court to award attorney's fees under the "Civil Rights Attorney's Fees Awards Act of 1976," P.L. 94-559, 90 Stat. 2641. That statute provides in pertinent part that the court [presumably meaning the trial court] may in its discretion allow the prevailing party a reasonable attorney's fee. The Appellees, of course, had no opportunity to argue to the trial court judge that they were the "prevailing party" within the meaning of the statute, inasmuch as the statute had not been enacted at the time of the trial court's hearing on Appellant's motion for attorney's fees. Moreover, the Appellees' Answering Brief had been filed in the Circuit Court on January 22, 1976, nine months prior to the enactment of the statute. Thus the argument in the Circuit Court of Appeals took place in a context in which the Appellees again had no opportunity to address the issue of who was the prevailing party in the trial court.

This action was framed under the provisions of 42 U.S.C. 1983. Because the case was settled, no evidence was received by the trial court and the record is totally silent as to whether the Mayor and Chief of Police participated in, had knowledge of, or were negligent with regard to the actions of the custodian of the jail that purportedly deprived the Appellant of federal rights, privileges or immunities under 42 U.S.C. 1983. Notwithstanding the absence of such necessary proof and notwithstanding a line of cases that would hold supervisory personnel liable only where such evidence was forthcoming, this Court apparently proposes to impose a form of strict liability upon the Mayor and Chief of Police by assessing against them the fees of an attorney who represented a prisoner, who by his own request, was returned to the very status, segregated confinement, which he had contested by precipitating this litigation. The imposition of attorney's fees under such circumstances is not equitable and is contrary to a large body of federal case law, as well as several hundred years of common law tradition holding supervisory public officers not strictly liable for the acts of their subordinates. We emphasize also that the record is totally devoid of any evidence that any of the Appellees deprived the Appellant of any "rights, privileges, or immunities secured by the Constitution and laws. . ." (42 U.S.C. 1983)

Under Hawaii law, if the Appellant were to sue the Appellees for money damages, he would be required to prove by clear and convincing evidence that the Appellees had acted maliciously and with an improper purpose. Orso v. City and County, 56 Hawaii 241, 534 P.2d 489 (1975); Medeiros v. Kondo, 55 Hawaii 499, 522 P.2d 269 (1974). Moreover, if the Appellees had been sued by the Appellant for money damages under 42 U.S.C. 1983, they also would have enjoyed under federal law a qualified immunity, the precise parameters of which apparently have not been determined. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 92 (1975), 43 L.Ed.2d 214; Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967), 18 L.Ed.2d 288. Thus, if Appellant had sought money damages from the Appellees, the Appellees would have had an opportunity to assert a qualified immunity under either state or federal law. Notwithstanding the immunity that the Appellees may have and the fact that they never have had an opportunity to assert these immunities, this Court expresses an inclination to award against the Appellees' expenses that are characterized as "costs" but that in fact are a form of damages.

In the case of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the U.S. Supreme Court held that a municipal government is immune from a lawsuit under the provisions of 42 U.S.C. 1983. Moore v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), extended this principle to county governments. These two cases, in conjunction with Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), make it fairly clear that an award of attorney's fees under 42 U.S.C. 1983 that must be paid from city or county funds is not permissible. Emphasis to this position is supplied by the absence of the City and County of Honolulu as a party to this litigation. It accordingly is clear that any attorney's fees awarded in this case must be against the Appellees as individuals.

In summary, notwithstanding the fact that the Appellees never have had an opportunity to contest that Appellant was the "prevailing party" as defined in a statute enacted subsequent to the trial court's disposal of this case, and notwithstanding the fact that the Appellees as individuals

have been precluded from asserting their immunities because of their decision to settle this litigation, and notwithstanding the fact that no evidence ever has been introduced to establish that the Appellees Fasi or Keala participated in, had knowledge of, or were negligent with regard to any actions by the custodian of the jail, and notwithstanding a total absence of proof that Appellant ever was deprived of any right, privilege or immunity by any of the Appellees, this Court apparently proposes to extract from Appellees a rather sizable sum of money to reward Appellant's attorney for bringing this unnecessary litigation. Appellees suggest that under the circumstances no attorney's fee legally is warranted and, if this Court disagrees, that at a minimum, the case should be remanded to the trial court for consideration of the matters set forth in this letter that Appellees have not had an opportunity earlier to raise.

Respectfully submitted,

RANDOLPH R. SLATON
Deputy Corporation Counsel

JER/RRS:jm

I hereby certify that a copy
of the within was duly mailed
on June 27, 1977
to Dennis Potts,
Attorney for Appellant,
at his last known address.
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondent's Response in Opposition to Petition for a Writ of Certiorari was mailed to RANDOLPH R. SLATON, ESQ., Deputy Corporation Counsel, City and County of Honolulu, Honolulu Hale, Honolulu, Hawaii 96813 on the 6 day of March, 1978.

DENNIS W. POTTS
Attorney for Respondent